Supreme Court, U.S.
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92-1782

No.

In The

Supreme Court of the United States

October Term, 1992

ARTURO ZULUAGA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err in departing upward from the guidelines based on the quantity of drugs for a violation of 21 U.S.C. Section 856?

2. Did the District Court's improper use of an articulated ground for departure entitle defendant to a remand for resentencing?

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The Opinion of the Court of Appeals in **United States of America v. Zuluaga** is unreported and a copy thereof appears in Appendix A to this Petition.

STATEMENT OF JURISDICTION

The Court of Appeals' Opinion in this matter was filed on January 20, 1993. This Court's jurisdiction is invoked under Title 28 U.S.C. 1254(1).

STATUTES INVOLVED

United States Constitution, Article I, Section 9, Clause 3; Article I, Section 10, Clause 1;

Title 21 U.S.C. 841(b)(1)(A), 846; Pub. L. 99-570, Title I, Section 1502(2), October 27, 1986, 100 Stat. 3207-2, effective on the same effective date at 18 U.S.C. Section 3583 [November 1, 1987]. See also the previous 21 U.S.C. 841(a); Pub. L. 99-473,

Title III, Section 502, October 12, 1984, 99 Stat. 2068.

STATEMENT OF THE CASE

A grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioner and two others in violation of 21 U.S.C. 841, 846, and 856.

The two co-defendants were subsequently dismissed from the indictment. Petitioner only plead guilty to the count charging a violation of 21 U.S.C. Section 856, maintaining a place for the distribution of cocaine base. Petitioner's plea was pursuant to a no-cooperation plea agreement. The District Court sentenced him to four years imprisonment. To understand the legal question, it is necessary to detail the facts of the offense and the plea agreement.

Petitioner and his co-defendants, Omar Ocampo and Carlos Aguila, were charged in a five count indictment with conspiracy to possess and the possession of cocaine and cocaine base, as well as aiding and abetting, and the maintenance of a place for the manufacturing of cocaine base.

The government dismissed the indictment against defendant Carlos Aguila after the hearing on a motion to suppress evidence.

The government dismissed the indictment against defendant Omar Ocampo as part of plea agreement. Defendant Ocampo was released on the day of Zuluaga's guilty plea.

The incident leading to petitioner's arrest occurred on September 13, 1991. At a suppression hearing prior to the plea, the following testimony was

elicited.

Philadelphia police officers went to an apartment house in Philadelphia as a result of information about suspicious occurrences at an apartment. Specifically, tenants had complained that there was a turpentine-like smell emanating from a certain apartment and Hispanics were seen coming and going from the apartment. Four officers went to the apartment house. Officers surveilled the door to the apartment. At some point, the front door opened and Ocampo appeared at the front door. In plain view, Ocampo handed petitioner a large quantity of currency which petitioner placed in a briefcase. As this was occurring, one of the officers approached the doorway. He peered over Ocampo's shoulder and into the apartment where he saw a large pile of cocaine on the

table across the room. The officers immediately arrested petitioner. Ocampo retreated into the apartment and slammed the door shut. Two officers ran to the rear of the apartment. Aguila was seen by the officers running out of the rear door. He was carrying a black bag. He was apprehended. The black bag contained $32,000.00 in cash.

The officers broke into the apartment and arrested Ocampo. They recovered approximately one kilogram of cocaine and 2 kilograms of cocaine base from the apartment. They also recovered various paraphernalia used in the manufacture of cocaine base and $11,000.00 in cash.

The officers seized car keys from petitioner and a few rental receipts for the apartment. One set of keys fit a black Ford Taurus which was parked in the garage area

of the apartment house. The car had two secret compartments which contained 15 kilograms of cocaine.

The lower court found the police officers credible and denied the motion to suppress.

Despite the above evidence, petitioner entered into a surprisingly lenient guilty plea. The agreement provided that petitioner would enter a plea of guilty only as to count five of the indictment, the count charging the maintenance of a crack house. The agreement was not conditioned upon any agreement to cooperate with the government. Specifically, petitioner expressly stated that he would not cooperate with the government or testify in this or any other investigation.

The agreement further provided that the government would make an upward

departure motion not to exceed 4 years imprisonment. At the time of sentencing, the government agreed that it would move to dismiss counts 1-4. At the time of the plea, the government moved to dismiss the indictment against Ocampo.

In addition, the government and petitioner stipulated that on September 13, 1991, petitioner drove to the apartment in the black Taurus which contained the cocaine, that the apartment was used to manufacture crack, that petitioner had keys to the apartment and the car and that he made rental payments on the apartment. Further, the government agreed that the base level for the offense was 16 and that defendant should be entitled to a two point reduction for acceptance of responsibility. The guideline range for a level 14 is 15-21 months.

The pre-sentence report raised the issues pertinent to this appeal. The investigator conceded that petitioner's offense level was 16 and he was entitled to a two point reduction. However, the investigator raised three reasons for an upward departure. First, Zuluaga had a 1982 conviction in New Jersey for delivery of a kilogram of cocaine and Zuluaga did not appear for sentencing. Thus, the prior conviction was not counted in his prior record score.

Second, Zuluaga committed the offense while a fugitive from the New Jersey case.

Third, the investigator asserted that the large quantity of drugs found in Zuluaga's "car" was an aggravating circumstance which is not factored in the guideline range in the statute. (paragraph

59 of defendant's pre-sentence report).

Petitioner objected to the report. Petitioner asserted that his criminal history category adequately reflected the seriousness of his past conduct. The Commission specifically did not include convictions which did not culminate in a sentence in a defendant's prior record score. This is because the sentencing judge would not know what sentence a defendant would receive and the present sentence would probably affect the sentence on the other case.

Second, the New Jersey conviction occurred almost 10 years ago. Certain convictions exceeding 10 years from the commission of the present offense are excluded from the criminal history category. See 4 A1.2.(e)(2). In any event, if a departure were warranted, it should be a

guided departure.

Petitioner objected to the use of the drugs in the car as a basis for departure. Petitioner acknowledged driving the car but there was no evidence that he was aware of the drugs.

Petitioner generally objected to the use of the quantity of cocaine recovered as a basis for a departure. Petitioner contended that the quantity of cocaine should not be a basis for a departure under the specific statute, 21 U.S.C. Section 856.

Lastly, the petitioner asserted that it would be patently unfair to dismiss 4 of 5 charges and then sentence petitioner as if he had been convicted or plead guilty to the entire indictment.

On June 26, 1992, the court conducted a sentencing hearing. The court concluded that the cocaine in the car could

not be attributed to Zuluaga. However, he found that the combination of the other factors warranted an upward departure. Specifically, the court found that:

1. Criminal history category does not adequately reflect seriousness of his prior history in that he plead guilty to a previous drug charge and did not appear for sentencing.

2. The defendant did not appear for sentencing on the other case so still on bail when he committed this offense.

3. Large amounts of drugs found in the apartment.

The Court sentenced Zuluaga to four years imprisonment.

REASONS FOR ISSUING A WRIT OF CERTIORARI

Petitioner Arturo Zuluaga respectfully requests that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit refusing to grant the Petitioner relief as a result of trial court's error in imposing a sentence of 48 months.

ARGUMENT

I. THE COURT ERRED IN DEPARTING UPWARDS FROM THE GUIDELINE RANGE.

Petitioner plead guilty pursuant to a plea agreement to one count of maintaining a place for the purpose of manufacturing cocaine base, in violation of 21 U.S.C. Section 856.

It is undisputed that the offense gravity score for that charge is sixteen. The government stipulated and the court agreed that defendant accepted responsibility for the offense. The guideline imprisonment range therefore is fifteen to twenty-one months.

At the sentencing hearing, the court explained its reasons for departing upward:

> **THE COURT:** All right. Thank you. All right, then, with reference to these arguments, the Court finds that there are aggravating circumstances that are of a kind and degree not

adequately taken into consideration by the Sentencing Commission in formulating the guidelines, and that this should result in a sentence different from that described by the guidelines. The departure from the guidelines is appropriate because with reference to his criminal history category the -- appears to the Court that criminal history category is not adequate to reflect the seriousness of his prior history in that he did plead guilty in 1982 to a serious charge, also a drug charge, and that had he appeared for sentencing, either when he originally got notice or sometime thereafter, had he not gotten notice the first time, that would have been reflected in the -- in his criminal history category.

In addition to that, the -- it seems to me another aggravating circumstances is the fact that he is still technically listed as a fugitive, and I don't -- by the courthouse records, and I don't attach any further significance to that in view of his claim that he did not get notice of the sentencing date, other than the fact that since he pled guilty to the charge, obviously he should have -- when he didn't get notice of a sentencing date, should have contacted the authorities, either directly or through his attorney and made arrangements for an alternative sentencing date. And also I note that since he was awaiting sentence, he committed this offense while he was out on bail on the other offense.

> The third factor that I would consider as an aggravating circumstance is that it appears to the Court that in connection with this particular crime that has been charged, there is no significance attached in the guidelines to the amount of drugs involved. And therefore it appears to the Court it is appropriate for me to consider in determining the seriousness of this crime and whether there is an aggravating or a mitigating circumstances, the fact that there was a very large amount of drugs involved in this apartment that he pled guilty to maintaining; namely, the 739 grams of crack and the one kilo of cocaine. So I will consider those things as aggravating circumstances.

Only one of the above factors should be relevant to departing upward, and that is the first factor. Defendant's criminal history category is arguably not representative of his true history. It should be emphasized that it is "arguably" not representative. Defendant's conviction occurred almost ten years ago. As such, it is remote and almost comes within the sentencing exclusion of Section 4 A1.2(e)(2)

of the guidelines. Further, defendant theoretically could have received a sentence of probation which would have kept him in category I, thus not affecting his sentence.

Additionally, it is significant that petitioner had no arrests or convictions since the date of his last conviction. However, even if the defendant had been sentenced and, assuming the worst, he had been given a sentence in excess of one year, three points would be added to his criminal history score. The three points would place him in criminal history category two, and his guidelines would be eighteen to twenty-four months. When there is a mechanism to compute a separate guideline level, that method should be used rather than permitting an unguided departure. See **United States v. Fayette**, 895 F.2d 1375 (11th Cir. 1990).

For similar reasons, the court's second reason appears to be excessive. Defendant went to trial but did not appear for sentencing. There was no evidence that he absconded from the jurisdiction. Penalizing the defendant for failing to appear for sentencing is really penalizing him twice for the same conduct relevant to factor I. Factor I and II constitute the same conduct in the context of this case and it would be patently unfair to enhance defendant's sentence for such a reason.

The last factor, the quantity of drugs in the apartment, is the most troubling issue and the issue which this Court should address. The government contended, and the court concluded that "quantity" of drugs is an aggravating factor because the drug quantity table is not used to calculate a sentence under 21 U.S.C.

Section 856. This does not make sense.

The applicable statute is certainly directed at prohibiting drug use and drug distribution or manufacturing. The absence of the drug quantity table from the applicable guidelines could not have been an oversight. The statute explicitly contemplates distribution.

The government relied on the case of **United States v. Ryan**, 866 F.2d 604 (3d Cir. 1989). In that case, the Third Circuit affirmed an upward departure for a defendant who had been found not guilty of possession with intent to distribute cocaine, but guilty of simple possession. The trial court departed upward, holding that the amount of cocaine involved was more consistent with distribution.

The Third Circuit affirmed the upward departure for several reasons. The

Court noted that there was no mention of quantity or purity in the guidelines for simple possession. Thus, the court reasoned that a departure could be made for a factor not contemplated by the guidelines.

Even though the undersigned strongly disagrees with the rationale of **Ryan**, the case is nevertheless distinguishable. The **Ryan** case dealt with a conviction for simple possession. The offense of simple possession contemplates a small amount of narcotics, namely, an amount consistent with personal use. See **Ryan** at 609. Likewise, in the case relied upon by **Ryan**, **United States v. Correa-Vargas**, 860 F.2d 35 (2d Cir. 1989), the defendant plead guilty to a telephone count, a crime which does not contemplate any amount of drugs. The court concluded that the quantity factor was an unusual circumstance in those

situations.

However, in case, the applicable statute envisions the operation of a crack house. The statute specifically refers to the manufacture, distribution and storage of a controlled substance. The background to the Application Note of Section 2 D1.8 refers to a crack house. It is incomprehensible that a large quantity of drugs, or an amount in excess of personal use was not contemplated by the criminal statute or by the guidelines since it refers to a drug operation.

More importantly, the **Ryan** court relied on another factor to uphold the departure, the fact that the drug in question was crack, and that crack is a horrible drug. Congress had recently amended the laws to increase the severity of the penalties relating to crack. Because

neither the criminal statute relating to simple possession nor the guidelines pertaining to it mentioned crack, the lower court's determination that it was an unusual circumstance was upheld.

The **Ryan** argument is inapplicable to the guidelines for 18 U.S.C. Section 856. As stated earlier, the background comment to the guidelines specifically refers to "crack" house. Because this factor was contemplated, it is not an unusual circumstance and is not a basis for a departure.

It should also be emphasized that the sentencing in **Ryan** occurred after a trial and not after a guilty plea. In **Correa-Vargas**, the defendant was permitted to plead to a telephone count to protect the identity of a confidential informant. In the case presently before the court, the

plea agreement was precipitated by the lack of integrity of the government's case.

This was not a small case. The two co-defendants were caught red-handed yet dismissed from the indictment. On its face, the case against Zuluaga appeared insurmountable, but he was permitted to plead to a non-mandatory count with low guidelines.

For whatever reason, the government did not feel comfortable with pursuing a conviction on all counts. To sentence defendant as if he had been convicted of all counts would be patently unfair. It would also render the guidelines meaningless if pursuant to a plea agreement, the government dismisses all of the serious counts, and then the defendant is sentenced as if he had been convicted of them. **See United States V. Faulkner**, 934 F.2d 190 (9th

Cir. 1991). The court should not use evidence of counts dismissed pursuant to a plea agreement to depart upward.

II. THE DISTRICT COURT'S IMPROPER USE OF ANY ARTICULATED GROUND FOR DEPARTURE ENTITLES DEFENDANT TO A REMAND FOR RESENTENCING.

The lower Court cited three reasons for departing upward; the inadequacy of defendant's criminal history; defendant's fugitive status for failing to appear for a sentencing on a 9 year old narcotics case; and the failure of the sentencing guidelines to adequately account for the quantity of drugs involved on a conviction for maintaining a place for the distribution of drugs, in violation of 21 U.S.C. Section 856.

In **Williams v. United States**, 117 L.Ed. 2d 341 (1992), the Court addressed a situation in which a district court departed

upward based on two grounds, one of which was determined to be improper. The issue was whether a defendant was entitled to an automatic remand upon a finding of a incorrect application of the guidelines or whether the appellate court would simply engage in a "reasonableness" test under section 3742 (f)(2). The court arrived at a result somewhat in the middle holding:

> We conclude that the party challenging the sentence on appeal, although it bears the initial court relied upon an invalid factor of sentencing, does not have the additional burden of proving that the invalid factor was determinative in the sentencing decision. Rather, once the court of appeals has decided that the district court misapplied the guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the sentence imposed. See Fed. Rule Crim Proc 52(a).

117 L.Ed. 2d at 355.

Thus, should this Court find that any of the three factors used by the district court was an incorrect application of the guidelines, than the court must next determine whether the error is harmless. A review of the record reveals that the second and third factors were misapplications of the guidelines and that the error was not harmless.

Petitioner and the government agree that the inadequacy of petitioner's criminal history **at most** could raise defendant to a category two and result in a guideline score of 18-24 months (Appellee's Brief at 10). However, the lower Court sentenced petitioner to 48 months. Thus, the Court must have relied on the second two factors.

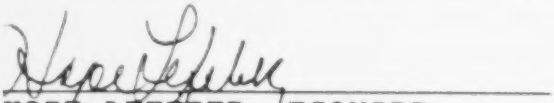
The government contends that petitioner's fugitive status is also a

separate basis for departure. What the government indirectly concedes is that under the facts of this case petitioner is being punished by the Court twice for the same conduct if the Court based its departure on both one and two . The Court departed upward because petitioner was never sentenced on the Jersey case. The Court also departed upward because defendant a fugitive, namely, he did not appear for sentencing. Here defendant is punished twice for the same conduct from different sections of the guidelines. Lastly, the Court based its departure on the failure of the guidelines to account for quantity of drugs for a conviction under 18 U.S.C. Section 856. In any event, if this Court should conclude that either the second or third factors constituted incorrect applications of the guidelines, defendant

should be resentenced.

CONCLUSION

For the foregoing reason, petitioner requests that a writ be granted.



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